Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

MOTION TO ACCEPT LATE-FILED COMMENTS OF THE NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

Pursuant to Section 1.46 of the Commission's rules, The New England Cable Television Association, Inc. (NECTA), by its attorneys, respectfully requests the Commission to accept its enclosed Comments in the above-referenced rulemaking proceeding.

These Comments were originally delivered by hand to the Commission's offices in Washington, D.C. at 5:30 p.m., January 27, 1993, just moments after the building had been closed and locked for the day. No party would be prejudiced by the acceptance of these Comments one day late, and NECTA respectfully requests that they be accepted by the Commission.

Sincerely,

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January 28, 1993

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Comments of

NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

The New England Cable Television Association, Inc. ("NECTA") is the regional trade association representing cable television operators in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Its members are substantially all the cable operators in New England, which include both small rural systems and national multiple system operators.

In response to the Commission's Notice of Proposed Rulemaking in this docket ("the Notice"),[1/] NECTA submits these comments on jurisdictional and procedural issues raised in the Notice to insure that, regardless of the regulatory model the Commission adopts, its rate regulations allow flexibility and deference for diverse state regulatory schemes. Title VI of the Communications Act as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act"), although it involves federal policy in myriad details of cable operations

[1/] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 92-544 (released December 24, 1992).

and policy, nonetheless retains the traditional "three-tiered Chinese puzzle of regulatory policy"[2/] weaving together federal, state, and local jurisdiction.

Thus, Section 623 of the 1992 Act leaves it up to a franchising authority to initiate rate regulation, with the Commission acting in a supervisory and backstop role only. Section 623 in turn leaves it to the States to determine the extent to which a franchising authority can initiate and carry out rate regulation, because a franchising authority must have "the legal authority to adopt ... such regulations." Section 623 (a)(3).

The New England states have adopted differing cable regulatory schemes that affect the extent to which franchising authorities in these states can regulate rates pursuant to Section 623. In Connecticut, Rhode Island, and Vermont, cable television is entirely under the jurisdiction of the state public utility commissions, which issue franchises and exercise regulatory powers.[3/] In Maine and New Hampshire, state statutes expressly confer on municipalities the authority to issue cable television franchises.[4/] Massachusetts follows a unique "mixed" regulatory approach in which franchising authorities are granted franchising powers, but subject to the

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[2/]Barnett, State, Federal and Local Regulation of Cable Television, 47 Notre Dame Law. 685 (1972).

[3/] Conn. Gen. Stat. §§ 16-1 (14-16), 16-331 to 333g (1988); R. I. Gen Laws § 39-19 (1984); Vt. Stat. Ann. tit. 30, §§ 501-15 (Supp. 1988).

[4/]Me. Rev. Stat. Ann. tit. 30, §§ 1901 (-B),(1-C), 2158 (Supp. 1988); N.H. Rev. Stat. Ann. §§ 53-C:1 to :5 (Supp. 1988).

supervision of the Massachusetts Community Antenna Television Commission; the latter Commission can void the issuance of a franchise but cannot issue a franchise itself.[5/] Thus, the Commission must bear in mind that a "franchising authority" is not always a "local franchising authority."[6/]

In each of these states, the legislatures also exercised their own regulatory authority, enacting legislation directly regulating aspects of cable television.[7/] Similar variations in the exercise of sovereign power play out among all the States. See generally C. Ferris, F. Lloyd & T. Casey, Cable Television Law ¶¶ 13.09[1], 13.10[1]] at 13-58.6 to 13-60, 13-67 to 13-68.4 (1983 & update 1992).

Massachusetts has exercised its sovereign power by authorizing deregulation of cable rates. Massachusetts General Laws, Chapter 166A, Section 15, authorizes the Massachusetts Community Antenna Television Commission ("the Massachusetts Cable Commission") to supervise regulation of rates by franchising

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[5/]Mass. Gen. Laws C. 166A,§§ 1-5 (1976 & Supp. 1988). Delaware, New Jersey, and New York also share authority between municipalities and state regulatory agencies. In these states, these agencies have power to issue franchises, unlike the Massachusetts Commission. See Del. Code Ann. tit. 26, §§ 601-16 (Supp. 1988); N.J. Stat. Ann. (Supp. 1992): N. Y. Exec. Law art. 28, §§ 811-831 (McKinney 1982 & Supp. 1989).

[6/]Cf., e.g., Notice ¶ 15 at 11 ("We interpret Section ... to permit certified **local franchising authorities** to regulate .... unless a **local franchise authority** seeks to assert regulatory jurisdiction ... we would have no independent authority").

[7/] See, e.g., Me. Rev. Stat. Ann. c. 30-A, § 3010 (service interruption credits and subscriber notices); Mass. Gen Laws. c. 166A, § 5 (mandatory franchise provisions); N. H. Stat. Ann. c. 53, §§ 53-C:3-d (subscriber notices, 3-d (records of subscriber complaints); R.I. Gen. Laws § 39-19-11 (elderly subscribers' right of recision); 30 Vt. Stat. Ann. § 514 (annual reports by cable operators).

authorities, to "investigate, fix and establish ... a fair rate of return from subscription rates charged to subscribers," and to suspend rate regulation in any system "upon a finding that adequate competitive alternatives exist ...." After rulemaking proceedings, the Massachusetts Cable Commission exercised this power by adopting procedures for local rate regulation subject to de novo review by the Cable Commission, and suspending rate regulation in those cities and towns where it found "adequate competitive alternatives" to cable television service based on the Commission's standard. 207 Code Mass. Regs. 6.00 et seq (attached as Exhibit A). Under this standard, the Massachusetts Cable Commission suspended rate regulation in some 132 Massachusetts cities and towns prior to enactment of the Cable Communications Policy Act of 1984 ("the 1984 Act"). Since the adoption of the 1984 Act, this regulatory scheme has remained unchanged.[8/]

As more fully discussed below, the Cable Act is not intended to displace these different regulatory schemes or the power of the States and their political subdivisions to change, mix, and

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8/ The 1984 Act explicitly acknowledged the Massachusetts (and California) regulatory scheme and preserved its deregulatory aspects pending the adoption of the FCC's effective competition standard under that Act. 47 U.S.C. § 543 (g); Cable Franchise Policy and Communications Act of 1984, Report of the Committee on Energy & Commerce, H. Rep. 98-934, 98th Cong. 2d Sess. ("1984 House Report") at 23, 24 (Aug. 1, 1984). Once the effective competition standard went into effect in 1986, most Massachusetts systems became deregulated under the Commission's broader definition of effective competition. To the extent that any Massachusetts issuing authorities established the absence of effective competition in their communities, their regulation of cable rates remained subject to the Massachusetts Cable Commission's regulations and supervision.

adopt such schemes as they see fit. Accordingly, the regulations that the Commission adopts in this proceeding must not cause such displacement by reading Section 623 of the 1992 Act -- regardless of state law -- as mandating rate regulation and conferring regulatory power on franchising authorities. Likewise, the Commission should not displace state law by default by adopting procedures for approving and revoking franchising authority regulatory jurisdiction that do not afford adequate opportunity to consider state law.

I. The 1992 Act Authorizes Rate Regulation Only to The Extent Permitted by State Law And Does Not Mandate Regulation Regardless of State Law

In the Notice, the Commission raises a series of questions going to the question whether the new Section 623 enacted in the 1992 Act is a mandate for rate regulation wherever the Commission finds that a cable system is not subject to effective competition.[9/]

These questions arise because much of the rhetoric surrounding the 1992 Act focused on cable rates and the resulting "broad language" of Section 623 (b).[10/] As correctly reflected

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[9/] Notice ¶ 4 at 5 (whether 1992 Act requires rollback to 1986 rates), ¶ 15 at 11 (whether FCC lacks independent jurisdiction unless franchise authority seeks jurisdiction), ¶ 16 at 12 (whether there are ways FCC can exercise regulatory jurisdiction where local authorities have not sought certification), ¶ 19 at 15 (whether Act authorizes franchising authority rate regulation irrespective of state law).

[10/] Notice ¶ 16 at 12. The Act reflects this by beginning with the finding that the 1984 Act deregulated 97 percent of cable systems and that, since then, cable rates have increased by 40 percent or more for 28 percent of subscribers and that average rate increases have outpaced the Consumer Price Index. It also declares that if the FCC finds that a cable system is not subject to effective competition under the standard defined in the Act,

(continued...)

in the Commission's tentative conclusion,[11/] such a reading is "at odds" with analysis of the specific operation of the Act. It is inconsistent with the reference in Section 623 (a)(3) to state law to determine whether a franchising authority has "legal authority" to regulate cable rates and with the concomitant grant of power to the Commission in Section 623 (a)(6) limited to "exercise [of] the franchising authority's regulatory jurisdiction" in specific circumstances.

If the 1992 Act were intended to require rate regulation, several provisions would be unnecessary. First, there would be no need for a franchising authority to certify that it has "legal authority" to adopt rate regulations, since that Act itself would confer such legal authority. Second, the FCC would have to have broader jurisdiction, since its jurisdiction is limited to situations where a franchising authority seeks to exercise jurisdiction but is disqualified from doing so; if a franchising authority does not seek to do so, there is nothing to trigger regulation by either the franchising authority or the FCC.

[10/](...continued)
"the rates for the provision of basic cable service shall be subject to rate regulation by a franchising authority or by the Commission ...," subsection (a)(2)(A); and directs that the FCC regulations "ensure that the rates for basic service tier are reasonable," subsection (b)(1).

[11/]Notice ¶ 16 at 12.

A. The 1992 Act Authorizes Regulation of Basic Rates Only Where A Franchising Authority Asserts Jurisdiction

1. The Act Gives Discretion to a Franchising Authority to Initiate Regulation.

The 1992 Act describes the authority to regulate rates as "permitted" by the Act. Section 623 (a)(3). The legislative history Act makes it clear that the option to seek rate regulation is up to the franchising authority. See Cable Television Consumer Protection & Competition Act of 1992, H. Rep. No. 102-628, 102d Cong., 2d Sess. at 80 (June 228, 1992)("House Report")(where systems are not subject to effective competition, rates "**may** be regulated in accordance with the terms of the Act. ... Subsection (a)(3) sets out the procedures under which a franchising authority **may** exercise the regulatory jurisdiction with respect to basic rates permitted under the Act. ... cable systems often serve communities, none of which alone may desire to exercise rate regulatory authority ...")(emphasis added).

Thus, insofar as the Notice suggests that the Act is a broader mandate for rate regulation that would impose universal rate regulation wherever a cable system is found not to be subject to effective competition, it overstates the scope of the Act. The Act **permits** regulation provided the criteria of Section 623 (a)(3) are met; it does not require regulation.

2. The Commission Has No Jurisdiction to Regulate Basic Rates Unless A Franchising Authority Initiates Regulation.

The commission is correct in concluding that it has no jurisdiction to regulate basic rates unless a franchising has sought regulatory jurisdiction and had its certification

disapproved or revoked.[12/] The Act confers jurisdiction on the FCC to regulate rates for basic cable service only "[i]f the Commission disapproves franchising authority's certification ... or revokes such authority's jurisdiction," and then only until the franchising authority has cured the defect in its qualification to regulate. Section 623 (a)(6). Likewise, Section 623 (a)(2) states that rates for basic cable service are subject to FCC regulation "if the Commission exercises jurisdiction pursuant to [Section 623 (a)](6)." The Act explicitly intended to limit the FCC's rate regulatory authority to these specific circumstances. See House Report at 81 ("The FCC may exercise regulatory jurisdiction with respect to basic cable rates **only** in those instances where a franchising authority's certification has been disapproved or revoked ...")(emphasis added).

Since Section 623 declares at the outset that "[n]o Federal agency ... may regulate the rates for the provision of cable service except to the extent provided under this section," the Commission clearly lacks authority to regulate basic cable rates except in the two specific instances where a franchising authority seeks to exercise regulatory jurisdiction but is disqualified from doing so.

Had Congress intended to require rather than permit regulation of basic cable rates, it could have adopted the Senate Bill, S. 12, which explicitly provided general authority for the

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[12/]Notice ¶ 15 at 11-12. Such general jurisdiction is distinguished from the FCC's authority under the "bad actor" provision to regulate services including nonbasic rates, that are identified as "unreasonable," and its authority to prevent "evasions." See Section 623 (c), (h).

FCC to regulate the rates of cable systems not subject to effective competition, unless a franchising authority qualified to carry out rate regulation. See S. 12, Section 5(b), in Cable Television Consumer Protection Act of 1991, Report of the Senate Committee on Commerce, Science & Transportation, Report No., 102-92, 102d Cong. 1st Sess. 114 (June 28, 1991)("Senate Report"); Senate Report at 73 ("the FCC shall regulate the rates"). Instead, Section 623 as reported by the Conference Committee and enacted by the full Congress adopts the House Bill which, as discussed above, makes the exercise of rate regulatory jurisdiction the franchising authority's option in the first instance, and limits the FCC's authority to circumstances where the franchising authority asserts but does not perfect jurisdiction.

In this light, the "broad language" of the Act must be looked at in context. The declaration that in cable systems not subject to effective competition "the rates for the provision of basic cable service shall be subject to rate regulation by a franchising authority or by the Commission ...." cannot reasonably mean that all such systems will be regulated. "Subject to" need not mean such rates are necessarily governed by regulation, but merely that they are amenable to rate regulation and, indeed, subsection (a)(3) adopts the latter meaning by describing this declaration as "permitt[ing]" rate regulation. Consistent with this meaning, the House Report interprets this language to mean that cable systems not subject to effective competition "may" be regulated. House Report at 80.

Likewise, the declaration in subsection (b)(1) that the FCC "shall, by regulation, ensure that the rates for basic service tier are reasonable," cannot be construed as a mandate to regulate rates in default of a franchising authority's exercise of jurisdiction. This declaration falls within subsection (b), which addresses the FCC's mandate to prescribe rules, rather than in the initial policy-declaring paragraphs of subsection (a). The rules mandated in subsection (b)(2) are described as intended "to carry out the FCC's obligations under paragraph (b)(1)," i.e., the obligation to ensure reasonable basic rates. In this context, the declaration of subsection (b)(1), rather than granting general jurisdiction, describes the FCC's main obligation in fashioning rules governing rate regulation and shapes the Commission's discretion accordingly.

Thus, the Cable Act contemplates that basic rate regulation will occur only if a franchising authority initiates the regulatory process under the Act and, as a result, that situations may occur where basic cable rates will not occur even though a cable system is not subject to effective competition.[13/]

[13/]The optional nature of rate regulation under the Act answers the question in the notice whether the Act is meant to reduce rates or "serve primarily as a check on prospective rate increases." Notice ¶ 4 at 5. Where rate regulation can come in to play only at the option of the franchising authority where the later has legal authority and otherwise qualifies to regulate, it can function only as a check because of the influence of regulated rates on unregulated ones and the potential that regulation may be imposed on unregulated systems. Although the policy declarations of the Act identify the extent of rate increases as a problem at which the statute is aimed, nowhere does the Act express the intention that rates be reduced. Likewise, while Congress intended to alter the 1984 structure of rate regulation as of 1992, nowhere did it express an intention

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B. A Franchising Authority Can Assert Jurisdiction over Basic Cable Rates Only Where It Has Legal Authority to Regulate as A Matter of State And Local Law.

The requirement that a franchising authority certify, among other things, that it has the "legal authority to adopt ... such regulations" in turn contemplates that rate regulation will not occur where a franchising authority lacks the power under state and local law to initiate the regulatory process.

The legal authority of franchising authorities is a function of state law. See Ferris, Lloyd & Casey, Cable Television Law, ¶ 13.01 at 13-7 (1983 & update 1992)("[a]t the local level, municipalities operate within the powers established for them at the higher tiers"). A local government body has no inherent right to grant and regulate franchises to cable television operators, but derives its power from the sovereignty of the state. Id. ¶ 13.10[1] at 13-67 to 13-68.1, citing Antieau, Municipal Corporation Law ¶¶ 29.01, 29.02 (1975) and 12 McQuillin, Municipal Corporations ¶¶ 34.14, 34.03 at 9 (3d ed. 1970)(emphasis added).

Section 636 (b) of the Cable Act, originally enacted in 1984 and unchanged by the 1992 Act amendments, declares that "[n]othing in this title shall be construed to restrict a State exercising jurisdiction with regard to cable services consistent with this title." 47 U.S.C. § 556 (b). The legislative history of Section 636 reflects that Congress did "not intend [the Cable Act] to upset the traditional relationship between state and

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13/(...continued)
to undo what had done as of 1986 (when Section 623 of the 1984 went into effect) at the time.

local governments, under which a local government is a political subdivision of the state and **derives its authority from the state.**" Cable Franchise Policy and Communications Act of 1984, Report of the Committee on Energy & Commerce, H. Rep. 98-934, 98th Cong. 2d Sess. ("1984 House Report") at 94 (Aug. 1, 1984) (emphasis added).

This traditional reference to state law as the source of the legal authority of a franchising authority extends to rate regulatory policy. "A state may, for instance, exercise authority over the whole range of cable activities such as ... rate regulation and deregulation ... as long as the exercise of that authority is consistent with [the Cable Act]." Id. And, as the Commission acknowledges in the Notice,[14/] "franchising authority" is defined by reference to state and local law. Section 602 (10), 47 U.S.C, § 522 (10). Thus, the Cable Act leaves it to the States to allocate franchising power and determine the extent of a franchising authority's power within the bounds of the Cable Act.

Thus, by requiring that franchising authorities have "legal authority" to regulate before they can obtain regulatory jurisdiction, the 1992 Act leaves it up to state law to determine if basic rates can be regulated. And to the extent that state law does not permit regulation -- either because it does not enable franchising authorities to exercise such power or because it affirmatively removes such power (as in Massachusetts) -- franchising authorities cannot certify to the FCC that they have

[14/]Notice ¶ 20 & n. 43 at 15.

such authority, and the FCC should not approve any such certification.

II. The 1992 Cable Act Does Not Preempt All State And Local Laws Governing Cable Rate Regulation.

The Commission asks whether, notwithstanding the Act's limits on its regulatory jurisdiction, it could exercise jurisdiction in states prohibiting regulation.[15/] The Act, however, permits the exercise of regulatory jurisdiction only where a franchising authority has "legal authority." Because such authority is a matter of state law, for the Commission to exercise such jurisdiction it would have to conclude that state prohibition on regulation are inconsistent with the Cable Act and therefore preempted. And for it to authorize the exercise of regulatory jurisdiction, it would have to conclude that the 1992 Act not only displaces state limiting franchising authority jurisdiction, but operates as a direct grant of jurisdiction.

The 1992 Act does not support any such conclusions. On the contrary, they are inconsistent with the Act's reference to the "legal authority" of franchising authorities to determine the scope of rate regulation.

A. The Act Does Not Authorize The Commission to Exercise Regulatory Jurisdiction Where A Franchising Authority Lacks Legal Authority to Regulate.

Under Section 623, the Commission exercises only as much authority as the franchising authority. Section 623 (a)(6) provides that if the FCC either disapproves a certification or

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[15/]Notice ¶ 16 at 12, ¶ 20 at 15.

revokes a franchising authority's rate regulatory jurisdiction, the FCC shall then "exercise the franchising authority's regulatory jurisdiction." If the franchising authority has no jurisdiction, however, there is no authority for the Commission to exercise in these circumstances. Likewise, the FCC's regulatory jurisdiction is temporary; it lasts only "until the franchising authority has qualified to exercise that jurisdiction by filing as new certification that meets the requirements ...." In other words, the Commission can regulate until the franchising authority cures the defect in its certification. But if a franchising authority lacks legal authority, how can it cure the defect? Accordingly, FCC regulation of basic cable rates is permitted only where state law authorizes rate regulation, but a franchising authority otherwise fails to qualify for certification.

If, on the other hand, a franchising authority could bring about rate regulation by asserting jurisdiction where it lacked legal authority to regulate itself and then get the Commission to exercise regulatory jurisdiction after disapproving or revoking the certification, the franchising authority would be able to achieve its goal with a false certification. The effect would be to render the certification requirement meaningless.

To the extent that the Notice appears to assume that the Commission will exercise jurisdiction wherever it denies (or

revokes) certification,[16/] we respectfully submit that it overestimates the Commission's jurisdiction.

B. The Act Does Not Preempt State Laws That Deregulate Cable Rates Or Otherwise Limit Franchising Authority Power to Regulate Rates.

A corollary of the Act's reference to state law to determine the legal authority of franchising authorities to regulate rates is that the Act does not preempt state laws and regulations governing such legal authority. Very simply, if the 1992 Act preempted state limits on local regulatory authority, there would be no need in the Act for the reference to "legal authority to adopt ... such regulations."

Neither the statement in Section 623 (a) that "[n]o Federal agency **or State** may regulate the rates for the provision of cable service ...," nor the reference to regulation under the statutory scheme only by "a franchising authority" (as opposed to a state except to the extent it is a franchising authority) negate the Act's reliance on "legal authority" as defined by state and local as the linchpin of regulatory authority.

[16/] See Notice ¶ 24 at 17 ("we also propose that, absent a stay, we will assume regulation of basic cable service rates in a franchise area after we deny a certification (assuming we also found the cable system is not subject to effective competition)"). This sentence should also add "and assuming we also found the franchising authority has legal authority to adopt rate regulation."

The preemptive declaration at the outset of Section 623 follows the preemptive framework of its 1984 predecessor,[17/] which cleared the field of overlapping regulation, but deregulation outset that field. This preemption is limited by the proviso "except to the extent provided under this section ...." Thus, it is necessary to examine the rest of Section 623 of the 1992 Act to determine to what extent the Section provides for rate regulation by the States.

As discussed above, Section 636 explicitly preserves the "traditional relationship between state and local governments," including their power over "rate regulation **and deregulation.**" See 1984 House Report at 94 (emphasis added). The requirement that a franchising authority have "legal authority" as a predicate to seeking regulatory jurisdiction recognizes the power of states to empower -- or disempower -- franchising authorities to regulate rates. The exercise of state statutory authority to disempower local authority in this area appears consistent with this recognition. Indeed, the Cable Act contemplates that a franchising authority may choose not to regulate rates. If such forbearance on the part of an individual franchising authority is

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[17/] The 1992 Act provision is substantively identical to the first sentence of the 1984 Act, which stated: "Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section." 98 Stat. 2788, Pub. L. 98-549, §623(a).

not inconsistent with the Cable Act, then similar forbearance as a matter of state policy cannot be considered inconsistent.[18/]

C. The Act Cannot And Does Not Grant Directly to Franchising Authorities The Power to Regulate Rates Notwithstanding State Law to The Contrary.

The Commission asks, on the other hand, whether the Cable Act authorized franchising authorities to regulate rates notwithstanding state law to the contrary.[19/] Such a direct grant of authority to political subdivisions of the state independent of state authority would be unprecedented.

Decisions involving federal regulation of the States indicate that so great an intrusion on state sovereignty, if permitted at all, would require an explicit congressional declaration that is not found in the 1992 Act. The "traditional relationship between state and local governments" recognized in Section 636 is inherent in the federal system. The federal system protects the sovereignty of the States through the Tenth Amendment to the Constitution, which reserves to the States any powers not specifically delegated to the federal government. The

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[18/]The Commission notes that the legislative history of the Act "suggests that the Act itself may abrogate franchise agreements in certain circumstances ...." Notice ¶ 20 at 15, citing House Report at 80. The House Report simply states that authority to regulate is not required to be embodied in a franchise agreement for a franchising to obtain regulatory jurisdiction, particularly in agreements that post-date the 1984 Cable Act. This statement does not abrogate agreements that **disclaim** regulatory authority in the event regulation is permitted. Likewise, it addresses only the private law of franchise agreements as a source of regulatory authority. Such a source of law distinct and on a very different preemption footing than public law, which may delimit regulatory authority or may mandate that it be addressed in a franchise agreement.

[19/]Notice ¶ 20 at 15.

delegation of state powers to agencies and political subdivisions of the States is part and parcel of their sovereignty: "[t]hrough the structure of its government ... a State defines itself as a sovereign." Gregory v. Ashcroft, __ U.S. __, 115 L.Ed.2d 410, 423 (1991). In enacting the Cable Act, Congress acted pursuant to its power to regulate interstate commerce. But Congress cannot delegate its legislative powers to the States, see United States v. Sharmack, 355 U.S. 286 (1958), much less their political subdivisions. And federal preemption pursuant to the commerce power acts to displace state or local authority, not to confer power.

Thus, Congress lacks the power under the Commerce Clause to confer regulatory authority directly on franchising authorities. At a minimum, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" Gregory, supra, 115 L.Ed.2d at 424, quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). Even if the Cable Act could be argued to imply a direct grant of rate regulatory authority to political subdivisions of the States, it contains no such grant "unmistakably clear in the language of the statute."

III. The Commission's Regulations Should Give Due Deference to State Regulatory Schemes.

A. The Regulations Should Permit Flexibility to The States to Exercise Their Power to Determine The Scope of Franchising Authority Power.

The Massachusetts regulatory scheme presents an anomaly that needs to be addressed in the Commission's regulations, lest the

1992 Act have the unintended effect of prohibiting some states from exercising their power to determine the "legal authority" of franchising authorities. Pursuant to its legislatively-delegated authority, the Massachusetts Cable Commission has adopted regulations that establish procedures for local rate regulation decisions and provide for its de novo review of local rate regulation decisions.[20/] But the Massachusetts Commission is not a "franchising authority" within the Cable Act definition of the term to the extent it is not empowered to grant franchises.[21/] Thus, although the Massachusetts Commission can define "legal authority" for purposes of state law, too narrow a definition of "franchising authority" in the FCC's regulations could deprive the Massachusetts Cable Commission -- and similarly situated state agencies -- of authority over the administration of its regulatory program.

The result would be to deprive Massachusetts of powers clearly exercisable by other states simply because of Massachusetts' unusual structure for regulation of cable television. In many states, including in New England the states of Vermont, Rhode Island, and New Hampshire, the state's role in cable policy is as a "franchising authority."[22/] Thus, the discretion accorded by Section 623 to franchising authorities to

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[20/]See 207 Code Mass. Regs. 6.00 et seq., attached below as Exhibit A.

[21/]The Cable Act defines the term as meaning "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522 (9). Under Chapter 166A, the Cable Commission can review the grant of franchises ("licenses"), but cannot issue a license.

[22/]See page 2 supra.

choose whether to regulate extends to states. And other states that retain franchising power at the state level and adopt a scheme of rate regulation like that in Massachusetts would not face the same question. It would be inconsistent with the scheme of federalism for the federal government to allow municipalities and states in their capacity as franchising authorities the discretion to choose whether to regulate cable rates, but not allow the same discretion to states acting in their capacities as sovereigns overseeing franchising authorities.

Thus, it seems unlikely that Congress intended to disable Massachusetts from exercising the same authority as other states in this area simply because of an idiosyncracy of its cable statute. Indeed, in 1984, Congress acknowledged the Massachusetts regulatory system without displacing it. See Section 623(g), 47 U.S.C. § 543(g); 1984 House Report at 2324. The 1992 Act must be read in this light and in conjunction with the Title VI as a whole.

The same situation could arise in other states that, in the wake of the 1992 Cable Act, choose to revise their regulatory schemes. It is quite foreseeable that some states that have franchises issued at the municipal level might choose to establish a uniform system of rate regulation to avoid disparate rates or obtain greater regulatory efficiency.[23/] For example,

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[23/]Such a system of regulation would be one response to the problem of regulating rates on a cable system basis rather than a community unit basis. See House Report at 80 ("cable systems often serve communities, none of which alone may desire to exercise rate regulatory authority ..."); Notice __ at ___. See also Comments of Continental Cablevision, Inc., MM Docket No. 92-259 (filed Jan. 4, 1993)(pointing out dilemma of system spanning communities in Connecticut and Massachusetts subject to differing

(continued...)

New Hampshire which, by statute, has delegated franchising power to cities and towns, regularly has considered legislation to give regulatory power to the state Public Service Commission. H. B. 350 (N.H., 1993). This legislation has gained additional momentum since the enactment of the 1992 Act as New Hampshire policymakers contemplate how to carry out rate regulation. If New Hampshire or any other state chooses to regulate through its utility commission or any other state agency, it should be free to do so without altering the franchising power of its political subdivisions.

Accordingly, the Commission's regulations should adopt a definition of "franchising authority" for the purposes of those regulations that includes any state agency authorized by state law to regulate basic cable rates.

Likewise, the regulations should permit such agencies to adopt rules and regulations that govern procedures for rate regulation by franchising authorities. Section 623 explicitly contemplates that franchising authorities may "adopt ... such regulations" provided they are consistent with the Commission's regulations. Section 623 (a)(3). Thus, any state that acts as a franchising authority is permitted by the act to adopt procedures governing its own rate regulation. If so, state adoption of similar regulations -- likewise subject to FCC regulations -- is not inconsistent with the Act and is an integral aspect of the

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23/(...continued)
regulatory requirements in different communities; the dilemma is magnified in the rate regulation context where the Connecticut systems all are subject to regulation by the Connecticut DPUC while the Massachusetts systems all are separate franchises with separate franchising authorities).

power of the States to determine the legal authority of their subdivisions and their traditional power to "exercise authority over ... rate regulation and deregulation" consistent with the Cable Act. 1984 House Report at 94.

B. The Regulations Should Afford an Adequate Opportunity to Resolve The "Legal Authority" of Franchising Authorities to Regulate Rates.

The Commission's Notice suggests that the Commission is inclined to accept pro forma a franchising authority's certification pursuant to Section 623 (a)(3), and leave it to the revocation process under Section (a)(5) to determine whether the franchising actually meets the statutory criteria for exercising jurisdiction, including "the legal authority ... to adopt regulations." To do so would be to abdicate the Commission's responsibility under the Act.

If it does not do so, the Commission would permit franchising authorities to gain regulatory authority where the Act declares they may not regulate. In particular, for the Commission to avoid a finding on this criterion would permit franchising authorities to regulate not only where do not have the authority under the Cable Act, but where they lack any authority altogether. The legislative history of the 1992 Act, by excluding some circumstances where the Commission might otherwise find lack of regulatory authority[24/] clearly contemplates that the Commission actively review the issue of legal authority to regulate.

[24/] See House Report at 81 (indicating that the Commission should not require that franchise agreements, especially those that post-date the 1984 Act, authorize rate regulation).

Appendix D to the Notice, the Commission's proposed certification form, fails to elicit the information necessary for the Commission to conduct such review. For the Commission to determine on the basis of this form if a certification is "defective on its face"[25/] will do nothing more than weed out the occasional franchising authorities that cannot figure out the right box to check. The Notice itself recognizes that, because the absence of effective competition goes to a franchising authority's "legal authority," it is "reasonable to require that local franchising authorities provide evidence ... as a threshold matter of jurisdiction."[26/] Consistent with this view, the same showing should be required on the source of legal authority.

The determination whether a franchising authority has the required legal authority involves a purely legal decision about a prerequisite for regulatory jurisdiction; unlike other criteria perhaps, it requires no factual determination or evidentiary hearing.

At a minimum, therefore, the Commission should permit cable operators or other interested parties to raise issues concerning legal authority pursuant to state law at the certification stage. Because the issue is a legal one, it is feasible to resolve it within the 30-day required by the Act. Provided service on a cable operator is required at the time a certification is filed with the Commission -- a requirement consistent with basic procedural fairness and with the Commission's proposal[27/] --

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[25/]Notice ¶ 23 at 16.

[26/]Notice ¶ 17 at 13.

[27/]Notice ¶ 23 at 16.

oppositions to a certification on the grounds of lack of authority (or other grounds) could be filed within the same ten days contemplated for issues raised on the Commission's own motion.[28/] This is little different from the accelerated pleading schedules the Commission contemplates for petitions by cable operators to revoke regulatory authority[29/] or to change effective competition status.[30/]

Allowing a cable operator or other interested party to raise such issues is more likely to bring about informed review than is Commission renew on its own motion. The Commission's apparent reluctance to engage in review in this area no doubt stems from concern about the magnitude of the task; by allowing others to raise the issues the Commission can adopt a more passive role than it would have to otherwise.

In the alternative, the Commission should require that the certification by a franchising authority be accompanied by evidence of its "legal authority to adopt ... regulations" as a

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[28/] Id. at 17.

[29/] Notice ¶ 27 at 18.

[30/] Id. ¶28 at 18.